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Supreme Court of the United States

October Term, 1973

No. 73-1512

BALDO M. KRISTOVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1973
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BALDO M. KRISTOVICH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

Baldo M. Kristovich respectfully petitions this Court for a Writ of Certiorari to review the final judgment of the Court of Appeal of the State of California, Fourth Appellate District, affirming his conviction on two counts of perjury.

Opinion Below.

The opinion of the Court of Appeal is unreported; it is reprinted herein as Appendix A.

Jurisdiction.

The judgment of the Court of Appeal was entered on December 6, 1973, and is set forth herein as Appendix B.

A timely Petition for Rehearing was denied by that court on January 7, 1974. The order of denial is set forth herein as Appendix C.

A timely Petition for Hearing in the Supreme Court of the State of California was denied by that court on January 31, 1974. This order of denial is set forth herein as Appendix D.

Jurisdiction of this Court herein is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented for Review.

In a state-court jury trial for perjury, where the offense is defined as wilfully false testimony under oath as to any material matter, may the court, consistent with the Fourteenth Amendment's guarantee of jury trial, instruct the jury that the alleged false testimony "was material as a matter of law"?

Constitutional and Statutory Provisions Involved.

1. United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

2. United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

3. California Penal Code, Section 118, West's Annotated California Codes, Volume 47, Page 230 (1970):

> "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may be

administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which such testimony, declarations, depositions, or certification is permitted by law under penalty of perjury and wilfully states as true any material matter which he knows to be false, is guilty of perjury."

Statement of the Case.

In 1969-70 petitioner, the Public Administrator of Los Angeles County (*see* California Probate Code §§ 1140 *et seq.*), sold two automobiles from estates under his administration to his brother, and one such auto to an auctioneer who served estates administered by the Public Administrator's office. The sales were at market value and were not illegal, but they did appear to violate office policies petitioner had instituted for his employees, forbidding them from selling estate property to relatives and business associates. To maintain employee morale, therefore, petitioner reported the three sales within his office under "fictitious" names: thus, for example, the sales to his brother were listed as having been made to "Mary Brady," which was the maiden name of petitioner's sister-in-law. The Los Angeles County Counsel's office thereafter prepared petitions for confirmation of these sales by the Los Angeles County Superior Court (probate department). The petitions, which included the "fictitious" names supplied by petitioner to his subordinates, were then signed by a Deputy of petitioner, "under penalty of perjury," in accordance with California law authorizing this form of oath. (California Code of Civil Procedure

§2015.5.) Upon these petitions the sales were approved by the probate court.

Based upon the petitions that he had neither prepared nor signed, petitioner was charged with two counts of perjury, in violation of California Penal Code § 118.[1] At trial, petitioner contested whether the "falsehoods" involving the purchasers' names were material matter. The petitions had been submitted pursuant to California Probate Code § 770, which provides that the administrator is chargeable with the actual value of depreciating property sold unless the court approves the sale post facto, "upon a sworn return." Petitioner urged that since the only issue in the confirmation proceedings was whether the sales had been for "actual value," the purchasers' names were not material. In support of this claim, petitioner adduced testimony of a probate court Commissioner—and voluminous documentary evidence—that the Los Angeles probate court routinely approved petitions under section 770 where the purchaser's name was listed as "various," or not even listed at all.

The trial judge, however, ruled that the names were material, and instructed the jury that they "were material as a matter of law." In conferences regarding settlement of the instructions, petitioner excepted to this instruction, as depriving him of his right of jury trial on all elements of the offense guaranteed by the

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[1]Petitioner was also charged and convicted on this basis of two counts of preparing false documentary evidence, California Penal Code § 134. That judgment was reversed by the Court of Appeal and remanded for redetermination of petitioner's motion for new trial, which has since been granted. The judgment of conviction of perjury here sought to be reviewed is absolutely final, and petitioner was separately sentenced to probation and fine on the perjury counts.

Fourteenth Amendment. After the jury found him guilty, petitioner moved for a new trial, again citing as error the constitutional infirmity of the materiality instruction. The motion was denied, and petitioner was sentenced to five years' probation and a $2,000 fine. On appeal to the Court of Appeal, petitioner again urged that California's rule leaving determination of materiality to the judge denied him his Fourteenth Amendment right to jury trial. The Court of Appeal affirmed, holding that this issue was governed by decisions of the California Supreme Court, and that any change in the law would have to come from that court. Petitioner petitioned for hearing by the Supreme Court on these grounds, but his petition was summarily denied.

Reasons for Granting the Writ.

The courts below applied California's rule, established by *People v. Lem You*, 97 Cal. 224, 228-29, 32 P. 11, 12 (1893), that in a perjury trial the court decides whether the element of materiality has been established, and instructs the jury on it "as a matter of law." This withdrawal from the jury in petitioner's case of a contested and "essential elemen[t] of the offense"[2] deprived petitioner of his constitutionally guaranteed right to a trial by jury.

The right of jury trial established by the Sixth Amendment is, of course, applicable to state-court defendants like petitioner, pursuant to the Fourteenth Amendment's due process guarantee. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The essence of the right is the interposition of a body of peers not only between the

[2]*People v. Dunstan*, 59 Cal.App. 574, 576, 211 P. 813 (1922).

accused and the state but also as a buffer from the possible caprice of the trial judge. *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); *accord, id.* at 373 & nn. 10, 11 (Powell, J., concurring). Accordingly, the constitutional provisions involved indispensably contemplate determination of all elements of an offense by the jury, not the judge; and an instruction by the judge that an element of the offense is present "as a matter of law" violates the constitutional guarantees. *E.g., Brooks v. United States*, 240 F.2d 905, 906 (5th Cir. 1957); *see, e.g., United States v. Lee*, 483 F.2d 959, 960 (5th Cir. 1973); *United States v. Manuszak*, 234 F.2d 421, 424-25 (3d Cir. 1956).

These fundamental principles are well exemplified by *Brooks v. United States, supra*, a perjury case. The trial court had there charged the jury, " 'as a matter of law'," that the officer before whom the oath was taken was legally empowered at the time of the offense. On appeal, this instruction was held to be reversible error, "for the all-sufficient reason that it deprived the jury of its function . . . as exclusive judges of the facts . . . and thus violated appellants' constitutional right to a trial by jury as guaranteed by the Sixth Amendment." 240 F.2d at 906.

The courts of California have similarly spoken from time to time, *e.g., People v. Shavers*, 269 Cal.App.2d 886, 888-89, 75 Cal.Rptr. 334, 335-36 (1969), but have postulated an exception to the Constitution's commands in perjury cases. California's historic rationale for treating perjury-materiality as a "matter of law" that the jury may not touch runs as follows. Materiality in the crime of perjury is a "question [that] is exactly the same" as the question of the materiality of

evidence objected to when offered in the course of a trial; the latter question is a "question of law," for the court not the jury; ergo, whether or not the false testimony of a perjury defendant was material is also to be decided by the court. *People v. Lem You, supra,* 97 Cal. at 228, 32 P. at 12. This reasoning is defective in all of its premises.

First, "materiality" means two different things on an objection to evidence and on a trial for perjury. As more than one court has noted, a greater probative tendency is connoted by the term "materiality" in the perjury context. *People v. Clemente,* 285 App. Div. 258, 261-62, 136 N.Y.S.2d 202, 205-06 (1954), *aff'd per curiam,* 309 N.Y. 890, 131 N.E.2d 294 (1955) (materiality for jury not court); *Weinstock v. United States,* 231 F.2d 699, 701 (D.C. Cir. 1956).[3]

Second, no matter which species of materiality is considered, its determination is not an abstract "question of law." Rather, it involves mixed application of a legal standard (*e.g.*, tendency to influence) in each case to a unique set of facts, namely the circumstances of the judicial proceeding in which the evidence is supposedly material. Thus, to call materiality in a ruling on evidence a question of "law" is merely to apply a label derived from the fact that the judge is the decision-maker. Realistically viewed, the deter-

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[3]The federal court's analysis is fully apposite here, since materiality under the California perjury statute has been construed as meaning virtually the same thing as the materiality concept in federal perjury law. *Compare People v. Pierce,* 66 Cal.2d 53, 61, 423 P.2d 969, 975, 56 Cal.Rptr. 817, 823 (1967) ("[t]he test is whether the statement could probably have influenced the outcome of the proceedings") *with, e.g., Blackmon v. United States,* 108 F.2d 572, 573 (5th Cir. 1940) ("materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it").

mination of materiality required upon a trial for perjury is "essentially a factual matter. . . ." *United States v. Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *see id.* at 380-81.

Finally, importation into the rules for perjury trials of the verbal fiction that "[t]he question of the materiality of evidence, no matter when or how it may arise, is always one of law for the court, and not of fact for the jury,"[4] can only be done by neglecting to take into account the jury's constitutionally mandated role of decision in such a trial—a function quite different from ruling on objections to evidence. And this is intolerable. As the court put it in *Brooks v. United States, supra*, "[h]einous as the crime of perjury is under our law, it is entitled to no relaxation of the constitutional guaranty of the citizen in order to punish it." 240 F.2d at 906.

California's determination-of-materiality rule is thus a constitutional anomaly of the gravest order. As one court in another jurisdiction that follows this rule recently noted, "the trial of a judicial perjury case is the only instance known where . . . a trial judge in a criminal jury case can direct a verdict against the defendant even as to one element of an offense." *Wilson v. State*, 284 So.2d 24, 25 (Fla. App. 1973). The rule's unconstitutionality has been the subject of scholarly criticism, *see* Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 Ind. L.J. 1, 9-14 (1959), but has never commanded the studied review

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[4]*People v. Lem You, supra*, 97 Cal. at 228, 32 P. at 12.

of this Court. We submit that unless the issue is met, the Constitution's guarantee of jury trial will remain an empty promise for petitioner, and for other citizens who must defend a charge of perjury.

Conclusion.

For the reasons just stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. BALL,
LAURENCE FREEMAN JAY,
Attorneys for Petitioner.

APPENDIX A.

[Not for Publication in Official Reports]

Court of Appeal, Fourth District, Second Division, State of California.

People of the State of California, Plaintiff and Respondent, vs. Baldo M. Kristovich, Defendant and Appellant. 4 Crim. 5956 (Sup.Ct.A 278 052).

["FILED: Dec. 6, 1973."]

APPEAL from the Superior Court of Los Angeles County. William Caldecott, Judge. Affirmed in part; reversed in part.

Joseph A. Ball for Defendant and Appellant.

Evelle J. Younger, Attorney General; and James H. Kline and Lawrence F. Sherb II, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, the former Public Administrator of Los Angeles County, was convicted by a jury of two counts of perjury and two counts of preparing false evidence. He was found not guilty of four counts of embezzlement/grand theft and one count charging grand theft alone. The jury was unable to agree on the remaining 15 counts, charging conspiracy to commit conflict of interest, conflict of interest, perjury and preparing false evidence. These remaining counts were dismissed in the interest of justice.

The convictions arose from the sale of automobiles which were in the defendant's possession as a public administrator. They were sold as rapidly depreciating personal property under Probate Code, § 770. (See *Estate of Depew*, 65 Cal.App. 2d 81.) The sales were made to Marin Kristovich, defendant's brother, and George Barclay, an auctioneer who conducted sales of

estate property, but the sworn returns, prepared by his chief deputy at defendant's direction, showed the sales to have been made to "Mary Brady" and "Henry George." Defendant contended that the sales were for fair market value and that the names of the buyers were not material under contemporary probate court procedures in Los Angeles County.

Defendant's first contention is that the court committed error in its instructions re materiality on the perjury counts.

The court instructed, in substance, that if the jury found that the defendant caused his employees to declare under penalty of perjury that the automobiles were sold to names other than the actual purchasers that such statements were material as a matter of law.

Defendant urges this court to reconsider the current law to the effect that the question of materiality is not an issue of fact for the jury but is an issue of law for the court to determine. Our position in the judicial hierarchy being what it is, we are unable to accede to this suggestion because this is the law in this state by reason of decisions of the Supreme Court. (See *People v. Pierce,* 66 Cal. 2d 53; *People v. Lem You,* 97 Cal. 224.) Rather obviously, if the law in this respect is to be changed, that change must come from the Supreme Court and not from this court.

At oral argument counsel advised this court that he had certain reservations concerning this contention. We do not construe his remarks as an abandonment of the contention and we wish to make clear that he has preserved the issue for presentation to the Supreme Court.

Defendant does argue that a contested issue of fact was withdrawn from the jury by the court's instruction

on materiality. The court's duty in a perjury case is to instruct the jury as to what facts would show material testimony. (*People v. Lem You, supra,* at p. 228.) When the materiality of testimony depends on the existence of certain facts, and these facts are controverted, their existence must be determined by the jury. (*People v. Chadwick,* 4 Cal.App. 63, 67.) Defendant claims that the probate court's interest in or indifference to the names listed as purchasers on returns of sale under Probate Code, § 770, was such a controverted fact, and the jury was prevented from determining it by the court's instruction that if the jury found defendant had caused the falsification of names, the statements were material. There was evidence that before defendant's indictment, the probate court routinely approved sales in which no names of purchasers were given—the space was either left blank or contained the word "various."

The test for materiality is whether the statement could probably affect the probate court's approval of the sales. The actual belief or opinion of the judge in the original proceedings is not controlling. (*People v. Pierce, supra,* 66 Cal. 2d 53, 61.) Where the purchaser is a relative or associate of the administrator, the court would probably conduct a more detailed inquiry into the sale to insure full value was received than would be necessary if it appeared the transaction was made at arm's length. Defendant was acquitted of the grand theft counts based on these two sales, but the sale price of the two cars was low enough to convince the grand jury to indict him for that offense in connection with them. So if the probate court knew who the real purchasers were, it might not have approved the sales—it was at least arguable that the sales price was too low.

The testimony that the probate court often approved returns which did not list names was contradicted only in a limited sense—Mr. Dana, the supervising probate attorney for the superior court, testified that "various" had generally been approved only when long lists of items were sold at auction, and that since defendant's indictment, names were always required. The superior court sometimes did approve returns of sale which did not list the names of the purchasers;[1] this was uncontradicted. But this is simply evidence that the false statements did not actually affect the proceedings. Given this fact, the trial judge nevertheless found the misrepresentation of the purchasers' names *could* have affected the probate court's approval of the sales, and this is the proper test. The materiality of the false listing of names does not depend on the existence of controverted facts—the facts favorable to defendant were essentially uncontroverted. Defendant was not denied the right to have the jury determine all the factual issues.

Nor was the materiality instruction equivalent to a directed verdict of guilt. The instruction told the jurors that statements described in five perjury counts were material, yet the jurors reached agreement on only two of those counts. The jurors were instructed on all the elements of perjury, and obviously some were convinced that every element was present in two instances, but were not convinced beyond a reasonable doubt in the other three. The instruction was on the existence of only one element of the crime; it was not, and the jury did not treat it as, a direction to find defendant guilty of perjury.

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[1]Here the names of purchasers were falsely listed. There is no evidence that the court ever approved returns where a purchaser's name was falsified if the falsification was called to its attention.

Whether or not the defendant felt in his own mind that the facts he was causing his deputy to declare to be true under penalty of perjury were not material is of no relevance, since it is no defense that he did not know the materiality of the false statement. (*People v. McRae*, 256 Cal.App. 2d 95, 119.) The defendant would inject a new element into a perjury case, i.e., that the defendant not only knew that the statement was false but also that he intended to make a false statement as to a material fact. Materiality is not to be determined in the mind of the defendant.

Defendant's second contention is that the trial court applied the wrong standard in its ruling on his motion for a new trial of his conviction of preparing false evidence.

On his motion for new trial, the defendant attacked the perjury verdicts only on the materiality issue. On the other counts he argued insufficiency of the evidence.

In his discussion on this issue, the judge made some puzzling statements.

He first stated that if he had been trying the case without a jury he would have acquitted the defendant because he had a reasonable doubt as to a "fraudulent or deceitful purpose" in the defendant's mind. He then correctly stated that his determination was to be whether there was sufficient credible evidence for the jury to have reached the determination it did. He stated that there was "adequate evidence" for the jury to make its determination and that if he had a "grave question as to the propriety of their ruling," he would have set the verdict aside. So far, so good.

Then in a further colloquy with counsel, the court stated:

> "With regard to the evidence on the preparing false evidence charge, were I trying the case without a jury, I would have had a reasonable doubt, and would have acquitted. I think there was sufficient credible evidence that 12 people could have reached the verdict that they did, and that *I am not permitted by law to impose any judgment on them;* and for that reason alone, I deny the motion for a new trial." [Emphasis added.]

Further colloquy ensued which was as follows:

> "MR. BALL: If you had to reweigh the evidence—
>
> "THE COURT: If I were weighing it myself alone, I would say I had a reasonable doubt.
>
> "MR. BALL: As to whether or not it was fraudulent or deceitful?
>
> "THE COURT: That is correct.
>
> "MR. BALL: *At this time you believe you are unable to reweigh the evidence?* [Emphasis added.]
>
> "THE COURT: *That is correct,* and I want to make it perfectly clear in the record so if the appellate court wants to think about what the rule is and what to rule on, it's there for them to do.
>
> ". . . I am putting it squarely to them." [Emphasis added.]

The expression "and that I am not permitted by law to impose my judgment on them" and the judge's statement that he was unable to reweigh the evidence makes it necessary that this matter be remanded to the trial court for the sole purpose of a new hearing

on the defendant's motion for a new trial on the two counts of preparing false evidence at which the court is to exercise its proper function and reweigh the evidence. Contrary to one of the judge's comments, a new trial may be granted even though the evidence is sufficient for conviction "from the standpoint of the appellate court." An appellate court may not reweigh the evidence; the trial court must do so on a motion for new trial. (*People v. Creswell*, 119 Cal.App. 2d 584, 586.)

The standard for the trial judge on a motion for new trial is not difficult. It is his function to see that the task of the jury to find the facts is intelligently and justly performed and to determine whether there is sufficient credible evidence to sustain the verdict. The verdict of the jury is not to be ignored and a new trial granted simply because the judge might have reached another result had the case been tried without a jury. However, the defendant is entitled to two separate decisions, one by the jury and one by the judge, each weighing the evidence and each exercising an independent judgment. (*People v. Robarge*, 41 Cal. 2d 628, 633.) This, the trial court declined to do in the instant case.

The judgments on the perjury counts are affirmed. The judgments on the counts of preparing false evidence are reversed for the sole purpose of a remand for a rehearing on the defendant's motion for new trial on these counts.

/s/ Gardner, *P. J.*

We concur:

/s/ Tamura, *J.*

/s/ Gabbert, *J.*

APPENDIX B

In the Court of Appeal, Fourth Appellate District, State of California Division Two 4 Crim. No. 5956.

People, Plaintiff and Respondent vs. Baldo M. Kristovich, Defendant and Appellant.

On Appeal from the Superior Court in and for the County of Los Angeles. S.C. No. A 278 052.

The above-entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED *by the Court that the*

Judgment(s)

of the Superior Court in and for the County of LOS ANGELES *in the above-entitled cause, be and the same* are *hereby* AFFIRMED in part and REVERSED in part as follows: The judgments on the perjury counts are affirmed. The judgments on the counts of preparing false evidence are reversed for the sole purpose of a remand for a rehearing on the defendant's motion for new trial on these counts.

APPENDIX C.

Court of Appeal—State of California, Fourth Appellate District, Division Two.

People, Respondent, vs. Baldo M. Kristovich, Appellant. 4 Crim. No. 5956, County No. A-278052.

["FILED Jan. 7, 1974"]

BY THE COURT:

The Petition for Rehearing is DENIED.

Gardner, *P. J.*

APPENDIX D.

[Supreme Court of California]

"San Francisco, January 31, 1974.

(4 Crim 5956, Div 2)—*People v. Kristovich.* Clark, J., did not participate. Appellant's petition for hearing denied."